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NLRB CLARIFIES REINSTATEMENT RIGHTS OF STRIKING EMPLOYEES

In *Jones Plastic & Engineering*, 351 NLRB No. 11, the National Labor Relations Board announced that at-will employment status does not detract from an employer's otherwise valid showing that it has permanently replaced striking employees. The Board overruled *Target Rock,* 324 NLRB 373, 374 (1997), enfd. 172 F.3d 921 (D.C. Cir. 1998), to the extent it is inconsistent with that principle.

An economic striker who unconditionally offers to return to work is entitled to immediate reinstatement unless the employer has hired a permanent replacement for the striker in order to continue its business operations during the strike. *Mackay Radio & Telegraph Co. v. NLRB*, 304 U.S. 333, 345-346 (1938). Thus, at the conclusion of a strike, an employer is not bound to discharge those hired permanently to fill the places of economic strikers, but permanent replacement status is an affirmative defense, with the burden on the employer to show a mutual understanding with the replacements that they are permanent.

Many employers hire employees on an "at-will" basis, meaning that they can be discharged at any time, with or without cause. In *Target Rock,* the Board opined that statements advising replacement employees of their at-will status "obviously do not support the [r]espondent's position that the striker replacements were permanent." In *Jones Plastic,* the General Counsel asserted that because *Target Rock* could be read to deprive at-will replacement employees of permanent status, the law should be changed to make clear that at-will employment does not foreclose a finding of permanent replacement status.

A Board majority (Chairman Battista and Members Schaumber and Kirsanow) concluded that at-will employment status does not detract from permanent replacement status, stating that

> we view as untenable any implication in *Target Rock* that conditions on hiring other than those enumerated in *Belknap* detract from a finding of permanent replacement status. Instead, we find that the status of the replacements hired by the Respondent in this case is indistinguishable from the status of probationary employees found to be permanent replacements in *Kansas Milling*, [97 NLRB 219, 225-226 (1951)], and its progeny. In those cases, the probationary employees were subject to discharge without cause, and their post-probation

> employment was subject to their satisfaction of the employer's standards. As a matter of law, then, equivalent conditions imposed by the Respondent through its at-will disclaimers do not detract from other evidence proving the replacements' status as "permanent employees" for the purpose of federal labor law.

Applying those principles, the Board found that the Respondent's issuance of at-will disclaimers informing employees that their employment was for "no definite period" and could be terminated for "any reason" and "at any time, with or without cause" did not detract from its showing of permanent replacement status. In reaching this conclusion, the Board noted that the Respondent was following its normal employment practices because the strikers as well as the replacements were employed on an at-will basis.

The Board found that the other evidence in the case supported a finding of permanent replacement status. The Respondent issued to the replacement employees forms stating that they were permanent replacements, in many cases naming the striker whom the individual was hired to permanently replace. The Respondent also told striking employees that it had begun to hire permanent replacements and that they risked permanent replacement if they did not return to work. The Respondent's human resource manager also told one replacement that he was a permanent employee. On these facts, the Board concluded that the Respondent established a mutual understanding with its replacement employees that they would not be displaced by returning strikers at the end of the strike, which is the meaning of "permanence" in this context.

Members Liebman and Walsh dissented. In their view, Board precedent established that at-will employment was *not* incompatible with permanent replacement status, and nothing in *Target Rock* required the overruling of that case. What is required to show permanent status, in their view, is "the promise to the replacements of some right vis-à-vis the strikers" – "'strikers . . . are entitled to reinstatement' unless the employer has made a commitment to the replacements that would be breached if the employer 'discharg[ed] them to make way for selected strikers . . .' [Belknap, supra, 463 U.S. at 503-504]."

The dissent noted that the Respondent had advised the replacements that their employment "may be terminated as a result of a strike settlement agreement . . . or by order the National Labor Relations Board" and stated that

> [h]ad the Respondent made only the latter statement, a finding that the replacements were permanent would follow. But the Respondent did not so limit itself. Rather, it told the employees not only that they could be displaced as a result of a strike settlement or Board order, but, *additionally*, that they could be discharged at any time for any reason. Taken together - and absent any other evidence of mutual understanding of permanence - the Respondent's statements did not reflect any commitment by the Respondent to the replacements. Certainly, the statements did not reflect a commitment that the Respondent would refuse, in the absence of a strike settlement, to reinstate strikers if it meant

> terminating replacements. Although the Respondent used the term "permanent replacement," it then undercut that statement by failing to give the replacements any assurance that they had rights vis-à-vis the strikers.

Because the dissent concluded that a mutual understanding of permanent employment was not established, in their view the Respondent violated Section 8(a)(3) and (1) of the Act by refusing to reinstate the strikers upon their unconditional offer to return to work.

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